

the Administrative Law Judge be able to hear appeals and, therefore, has deleted the reference to the statute. Nonetheless, SBA expects that OHA judges will look to legal precedent developed under the arbitrary and capricious standard of the APA in deciding appeals from these enforcement provisions.

Many comments were received that the regulations should allow the SBA Office of Hearings and Appeals to have a de novo review of enforcement actions in § 120.856(e). Several comments contended this review was provided under current regulation (SBA does not interpret the regulation as providing such review, but acknowledges that the current regulation is unclear). One comment stated that the arbitrary and capricious standard imposes such an "excessive" burden upon the CDC that "the decision of the program office would necessarily be affirmed by OHA even if it was obviously wrong."

SBA has considered but disagrees with these contentions and has retained the original proposed regulations provision that the OHA review is limited to the arbitrary and capricious standard, a standard of review which is well established under the law. As previously noted, the fact that SBA enforcement actions are undertaken with considerable review and deliberation, and that numerous agency officials are involved in the decision, should allay those concerned about arbitrary decisionmaking. However, the decision to take an enforcement action necessarily involves policy judgments about what action is in the best interests of the Agency and the 504 Program. Therefore, SBA does not believe that it is appropriate or in the best interests of the 504 Program for the OHA, which is not a policymaking office and which does not have the familiarity and experience with the 504 Program, to be able to undertake a de novo review and to make policy for the 504 Program.

Further, the arbitrary and capricious standard, although a deferential review, requires that the Agency have a rational and reasonable basis for its decision. If such a basis is lacking, the matter should be remanded back to the Agency for further consideration. A review of the numerous cases which have applied this standard and remanded agency decisions refutes any assertion that the arbitrary and capricious review is merely a rubber stamp of an agency's decision.

Several comments took the position that de novo review by the OHA was required based upon the assertion that procedural due process under the Constitution requires that the decision be made by a "fair, neutral decision

maker." These comments, however, did not argue or show a basis for any suggestion that the AA/FA was not a fair, neutral decision maker. Moreover, to the extent these comments assert that an appeal of an agency decision to an independent office of the agency is required by constitutional due process, those comments are simply mistaken. SBA could, and, indeed, has in numerous regulations, provided that the decision by the relevant agency official is the final agency action, without providing any right of appeal to the OHA. OHA review of enforcement actions is not a right, but an accommodation that SBA has chosen to provide to CDCs in order to improve the fairness of the enforcement procedures.

Several comments contended that the regulations should allow a CDC to raise arguments with the OHA that it had not made to the Agency in responding to a proposed enforcement action, and that CDCs should have a right of discovery or to subpoena third parties in the OHA to add information to the record of the agency's decision. One comment's justification for allowing new arguments to be raised before the OHA was that "the CDC may easily forget an important matter and not raise it or make a submission * * * without relying on counsel."

SBA also considered but is not persuaded by these comments. If the CDC provided the OHA with arguments or information obtained through discovery in the OHA that were not considered by the Agency, the OHA's review would not merely evaluate whether the Agency's decision was supported by the administrative record, but would necessarily entail a de novo review of the underlying matter. As stated above, SBA believes such review is inappropriate. Additionally, a CDC that is faced with a proposed enforcement action or immediate suspension would be best advised to make sure that it diligently provides all relevant information to the Agency and consults with counsel to the extent it deems such consultation to be appropriate.

Nevertheless, SBA does agree that a CDC that can show that it was unable to present facts or an argument to the AA/FA due to compelling reasons beyond its control, and that it has been prejudiced by this inability, can request that the OHA remand the matter back to the AA/FA for further consideration. This procedure is set forth in new language that has been added to § 120.856(e). Similar language has been added to newly renumbered § 120.856(b) with respect to a CDC's objection to a notice of a proposed

action or immediate suspension, with conforming language added to § 120.856(e)(3).

SBA also has added language to § 120.856(e) that if the OHA decides that SBA's decision was arbitrary, capricious or contrary to law, the OHA must remand the matter to the AA/FA or the deciding official for further consideration. Although this was clearly implied in the proposed rule, it was not explicitly stated and so SBA has added this language to the final rule for clarification.

As discussed above with respect to § 120.810 and elsewhere, SBA has deleted language from the proposed regulations to the effect that the procedures in §§ 120.854 to 120.856 do not apply to those sections. SBA has added a new paragraph 120.856(f) which incorporates the concept of the deleted language to specify that the procedures in § 120.856 only apply to actions undertaken pursuant to § 120.855.

Section 120.861, job creation or retention, is revised (see discussion of revisions to § 120.829 for a description of the changes to the job requirement criteria and the comments received). The change in the criteria will be published in a **Federal Register** notice from time to time.

Section 120.862, other economic development objective, includes two technical changes. The first is the Agency-wide replacement of "SIC" codes with "NAICS" codes when identifying the types of small businesses eligible to receive SBA assistance. The second is to correct the cross-reference to the regulation that describes a minority for purposes of the public policy goal of assisting minority-owned businesses. The changes also reflect the statutory changes to section 501(d) of the Act, which added women-owned and veteran-owned businesses to the public policy goals.

Section 120.870, leasing project property, eliminates references to 504 project property being leased by the CDC to the borrower. Comments received suggested revising SBA's rules regarding leasing to be more flexible. SBA considered these comments to be beyond the scope of the proposed rule. Therefore, SBA is adopting § 120.870 as proposed.

SBA is changing the heading of § 120.871 to make the form consistent with other section headings.

Section 120.880, basic eligibility requirements, simplifies the regulation by replacing the actual size standards with a cross-reference to the size standard regulation. As the size standard regulations change, so will this